INSOFEX SDN BHD

v.

LABASAMA GROUP (M) SDN BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-456 OF 1993]
27 JANUARY 2000

CIVIL PROCEDURE: *Action - Action for specific performance or damages in lieu thereof - Action for specific performance abandoned after payment of money by defendant - Plaintiff proceeded with claim for damages - Trial judge ordered damages to be assessed - Court of Appeal and Federal Court set aside said order of trial judge - Whether action still remained between parties - Whether plaintiff could still proceed with action - Whether plaintiff could amend writ and statement of claim - Whether plaintiff could claim for damages so long as trial had not begun*

The plaintiff commenced an action against the defendant for specific performance of an agreement made between the said parties and in the alternative, for damages for breach of contract. The defendant then handed a cheque of RM136,000 to the plaintiff as full settlement of the whole case. However, at the hearing, the plaintiff informed the court that it was abandoning the claim for specific performance but was proceeding for damages to be assessed by the Senior Assistant Registrar ('SAR') *in lieu* thereof. The trial judge acceded to the request of the plaintiff and ordered that damages be assessed accordingly. The defendant appealed to the Court of Appeal and the Court of Appeal set aside the order of the trial judge. The Federal Court, too, concurred and affirmed the decision of the Court of Appeal. However, both the superior courts did not strike out the civil action between the parties herein. The plaintiff proceeded to prosecute the said action and applied for leave to amend under O. 20 r. 5 of the Rules of the High Court 1980 ('RHC'). The defendant then applied to strike out the said action and that was granted by the SAR. Hence, the instant appeal by the plaintiff against the said decision of the SAR.

Held:

[1] The civil suit between the parties still persisted and was in existence. The plaintiff had every right to pursue the matter right to the very end and it was not an abuse of the process of the court for the plaintiff to proceed with the claim.

[2] The civil suit should proceed for trial so that the court would be able to determine whether: (i) the payment of RM136,000 paid by the defendant to the plaintiff amounted to full and final settlement; and (ii) if the answer was in the negative, whether the plaintiff's claim for damages was limited to RM136,000 on the assumption that the plaintiff had established a breach of contract by the defendant.

[3] Section 74(1) of the Contracts Act 1950 gives the power of the court to order damages for breach of contract. Also, s. 18(2) of the Specific Relief Act 1950 enacts that the court upon an application by any person for specific performance, may, if it decides that specific performance ought not to be granted, grant compensation.

[4] If a party claims for specific performance but abandons it at the trial, the court cannot award damages at common law without sufficient amendment.

[5] The question of granting relief by way of damages *in lieu* of or in substitution of specific performance is a matter resting entirely with the court and parties have nothing to do with it. The plaintiff cannot be allowed to abandon the case for specific performance and yet claim damages *in lieu* thereof. If the plaintiff so chooses to abandon his claim for specific performance and pursue his claim for damages, he must do so before the trial begins. In the present appeal, the trial had not proceeded and the plaintiff applied to amend the writ and the statement of claim in order to comply with the decision of the Court of Appeal.

[Appeal allowed.]

Case(s) referred to:

AG of Duchy of Lancaster v. L & N W Ry, [1892] 3 Ch 274 ***(refd)***
Austin Securities Ltd v. Northgate and English Stores Ltd [1969] 2 All ER 753 ***(refd)***
Arah Cipta Sdn Bhd & Ors v. Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 MLJ 11 ***(refd)***
Ardeshir H Mama v. Flora Sassoon AIR [1928] 208 ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 3 MLJ 36 ***(refd)***
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 3) [1970] Ch 506 ***(refd)***
Chinnock v. Sainsbury [1860] 30 LJ Ch 409 ***(refd)***
Derrick v. Williams 55 TLR 676 ***(refd)***
Chapman, Morsons & Co v. Auckland Union Guardians [1889] 23 QBD 294 ***(refd)***
Diamond Peak Sdn Bhd & Anor v. Tweedie [1980] 2 MLJ 31 ***(refd)***
GL Baker, Ltd v. Medway Building & Supplies, Ltd [1958] 1 WLR 1216 ***(refd)***
Gopi Nath Sen and Others v. Bahadurmul Dulichand and Others AIR [1979] 203 ***(refd)***

Horsler v. Zorro [1975] Ch 302 ***(refd)***
Hyams v. Stuart King [1908] 2 KB 724 ***(refd)***
Instrumatic Ltd v. Supabrase Ltd [1969] 2 All ER 131 ***(refd)***
J Leavey & Co v. Hirst [1944] KB 27 ***(refd)***
Jamir Hassan v. Kang Min [1992] 2 MLJ 46 ***(refd)***
JC Williamson Ltd v. Lukey and Mulholland [1931] 45 CLR 282 ***(refd)***
Johnson v. Agnew [1980] AC 367 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 2 MLJ 565 ***(refd)***
Lavery v. Pursell [1888] 39 ChD 508 ***(refd)***
Lawrance v. Norreys 39 Ch D 217 ***(refd)***
Leeds Industrial Co-operative Society v. Slack [1924] AC 851 ***(refd)***
Lewers v. Earl of Shaftesbury [1866] LR 2 Eq 270 ***(refd)***
Malayan Banking Bhd v. Gan Kong Yam [1972] 1 MLJ 32 ***(refd)***
Norton v. Angus [1926] 38 CLR 523 ***(refd)***
Raja Zainal Abidin bin Raja Haji Takchik & Ors v. British-American Life & General Insurance Bhd [1993] 3 MLJ 16 ***(refd)***
Price v. Strange [1978] Ch 337 ***(refd)***
Reichel v. Magrath 14 App Cas 665 ***(refd)***
Remmington v. Scoles [1897] 2 Ch 1 ***(refd)***
Rogers v. Challis [1859] 27 Beav 175 ***(refd)***
Ryan v. Mutual Tontine Westminster Chambers' Association [1893] 1 Ch 116 ***(refd)***
Scott v. Rayment [1868] LR7 Eq 112 ***(refd)***
Sefton v. Tophams Ltd [1965] Ch 1140 ***(refd)***
Sekemas Sdn Bhd v. Lian Seng & Co Sdn Bhd [1989] 2 MLJ 155 ***(refd)***
Shelfer v. City of London Electric Lighting Co [1895] 1 Ch 287 ***(refd)***
Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd [1995] 4 MLJ 691 ***(refd)***
Stephenson v. Garnett [1898] 1 QB 677 ***(refd)***
Stimson v. Gray [1929] 1 Ch 629 ***(refd)***
Tan Keat Seng, Kitson v. Kerajaan Malaysia [1996] 1 MLJ 454 ***(refd)***
Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 ***(refd)***
Tengku Jaafar bin Tengku Ahmad v. Karpal Singh [1993] 3 MLJ 156 ***(refd)***
Tildesley v. Harper 10 Ch D 396 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Waring and Gillow Ltd v. Thompson [1912] 29 TLR 154 ***(refd)***
Williamson v. London, etc [1879] 12 Ch D 787 ***(refd)***
Woodlands v. Hind [1955] 2 All ER 604 ***(refd)***
Worthing Corpn v. Heather [1906] 2 Ch 532 ***(refd)***
Zaibun SA Syed Ahmad v. Loh Koon Moy & Anor [1982] 2 MLJ 92 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74(1)
Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(d), O. 20 r. 5, O. 25 r. 1(4), O. 37 r. 4, O. 81, O. 92 r. 4
Specific Relief Act 1950, ss. 18(1), (2), 19, 28

Lord Cairns' Act 1859 [UK], s. 2
Rules of the Supreme Court [UK], O. 14A r. 1(1)
Specific Relief Act 1877 [India], ss. 19, 21, 29
Supreme Court Act 1981 [UK], s. 50

Other source(s) referred to:

Damages in Equity: A Study of Lord Cairns' Act, Jolowicz [1975] CLJ 224, 228-229
A Treatise on Specific Performance of Contracts, Williamson Donaldson Rawlins, 5th edn

For the plaintiff - Gana Muthusamy; M/s Gana Muthusamy & Co
For the defendant - C Kumareson; M/s Saga & Kumar

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Background Scenario

This was an interesting case. The chequered history began with an order of this court dated 28 March 1995 which culminated in an appeal to the Court of Appeal and finally to the Federal Court. The case reverted back to me by way of an encl. 74 which was an appeal to the judge in chambers filed by the plaintiffs against the decision of the senior assistant registrar ("SAR") dated 22 October 1998 wherein the SAR acceded to the defendants' application under O. 18 r. 19(1)(d) of the Rules of the High Court ("RHC") and under O. 92 r. 4 of the RHC (encl. 62) to strike out the plaintiffs' claim with costs.

I have since written a judgment in regard to my order dated 28 March 1995 but unfortunately it has not been reported (hereinafter referred to as the "first judgment") and everything revolved on that first judgment.

The facts have been sufficiently set out in the first judgment and it would be germane to allude and refer to them as they are of equal importance in adjudicating encl. 74.

The plaintiffs commenced a writ action against the defendants and sought for the following prayers (see encl. 2A):

> (i) Specific Performance of an Agreement dated and entered into between the Plaintiffs and the Defendants in that the Defendant(s) be ordered to deliver the titles free of encumbrances with the duly executed and attested the title deeds in respect of the said property within six (6) weeks of the order of Court to be made herein;

(ii) Further damages in the alternative damages for breach of contract;

(iii) Special Damages in the sum of RM163,730.00 for costs and disbursements paid in respect of this transaction and interest thereon at 10% from the 8th of May 1993 till realisation;

(iv) Return of the deposit of RM136,000.00;

(v) Return of the further sum of RM22,000.00 payment to facilitate the removal of the condition No. 2;

(vi) Interest on the sum of RM136,000.00 at 10% p.a. from the 8th of May, 1993 till the day of payment;

(vii) Further interest on the sum of RM22,000.00 at 10% p.a. from 8th May 1993 till the day of payment;

(viii) An Injunction to restrain the Defendant or anyone else claiming a right or title thereunder to deal with the said property (in) any manner whatsoever;

(ix) And costs of this suit.

Dated the 8th day of December 1993.

Sgd. (Illegible).

Solicitors for the Plaintiff

Of pertinence would be the prayers for specific performance of that agreement and "in the alternative damages for breach of contract".

The defendants responded by filing a statement of defence dated 24 February 1994. In due course, the plaintiffs filed an application in encl. 11 for specific performance of that agreement under O. 81 of the RHC and for the SAR "to assess damages for breach of contract pursuant to O. 37 of the RHC."

The notes of evidence of the first judgment can easily be seen in exhibit marked "FOC1" of encl. 61 and in the course of hearing encl. 11, the notes of evidence showed that on 20 February 1995, Madam Vijaya Gopal, the then counsel for the defendants, handed a cheque for RM136,000 to the then counsel for the plaintiffs, Mr. S. Balarajah, as full settlement of the whole case. Mr. S. Balarajah accepted the cheque and quickly asked for an adjournment as he needed time to ascertain whether the cheque was good. The hearing was then adjourned to 28 March 1995 and on that date Mr. S. Balarajah informed the court that the cheque had cleared and that he was abandoning specific performance but he was proceeding for damages to be assessed by the SAR *in lieu* of specific performance. Madam Vijaya Gopal informed the court that her instructions were to pay RM136,000 with no

damages at all and if the plaintiff proposed to proceed with the damages to be assessed by the SAR then she would discharge herself. At any rate, Madam Vijaya Gopal agreed that the application for specific performance be struck off. Mr. S. Balarajah responded and replied that there was no agreement that the sum of RM136,000 was to be in the form of a final payment. I then made the following orders:

> Permohonan specific performance dibatalkan dengan persetujuan
> (By consent the application for specific performance was struck off)
>
> Damages ditafsirkan oleh SAR di bawah Order 37 of the RHC
> (Damages to be assessed by the SAR pursuant to Order 37 of the RHC).

Aggrieved by these orders, the defendants appealed to the Court of Appeal *vide* Civil Appeal No: 02-322-1995 and that appeal came up for hearing on 23 July 1996. The Court of Appeal, comprising of Shaik Daud JCA, Siti Norma Yaakob JCA and Abdul Malek Ahmad JCA, allowed the appeal. Shaik Daud JCA writing for the Court of Appeal and in his written judgment which has not been reported but exhibited in encl. 61 of exh. "FOC 4" (hereinafter referred to as the "second judgment") went straight to the heart of the matter and said:

> The essence of the respondent's claim (referring to the plaintiffs) in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regarded as an alternative claim. They cannot get both remedies. If they claim for specific performance, they are treating the agreement as still subsisting and wants the other party to perform it. If their claim is for damages for breach, they are treating the agreement as having come to an end and therefore incapable of being performed. As stated earlier the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach. They therefore ought to amend their pleadings and without doing so, the learned Judge ought not to have ordered damages to be awarded to them. The respondent cannot be allowed to change the whole nature of their claim which essentially is a claim for specific performance, by turning it into an ordinary action for damages. (See *Hipgrave v. Case* [1885] 28 Ch D 356).
>
> In the circumstances of this case, we are of the view that the learned Judge erred in law in ordering the assessment of damages. We accordingly allowed the appeal with costs, set aside the order of the learned Judge and ordered the deposit to be refunded to the appellant (referring to the defendants).

The plaintiffs being dissatisfied with the decision of the Court of Appeal applied for leave to appeal to the Federal Court. On 24 February 1977, the Federal Court presided with a coram consisting of Mohd Eusoff Chin, Chief

Justice of Malaysia, Wan Adnan Ismail FCJ (as he then was, now Chief Judge, Malaya) and Peh Swee Chin FCJ (as he then was), and gave leave. On 25 August 1997, the Federal Court sitting in Penang with a coram of Mohamed Azmi FCJ, Mohd Dzaiddin FCJ and Gopal Sri Ram JCA heard the appeal proper and dismissed the plaintiff's appeal and upheld the decision of the Court of Appeal. There was no written judgment of the Federal Court and so there was nothing to fall back to in adjudicating encl. 74.

Four observations must be made in regard to the effect of the decisions of the Court of Appeal and the Federal Court. Firstly, no amendment or substitution was made to the order of the Court of Appeal dated 23 July 1996 by the Federal Court. Secondly, my order dated 28 March 1995 in allowing damages to be assessed was set aside. Thirdly, since the application for specific performance was struck off by me with the consent of both parties, it could not be the subject matter of an appeal. Fourthly, neither the Court of Appeal nor the Federal Court struck out the present civil suit between the parties.

Steps Taken Out By The Plaintiffs

In encl. 59, the plaintiffs filed a summons for directions on 2 October 1997 under O. 25 of the RHC. The plaintiffs too filed encl. 77 by way of a summons in chambers on 25 November 1998 for leave to amend the writ and the statement of claim under O. 20 r. 5 of the RHC which was supported by an affidavit affirmed by Mr. Gana Muthusamy in encl. 76.

Summons for directions must surely be the best way to identify the issues in order to govern the manner in which the evidence should be presented at a trial with a view principally to shorten the length of the trial and to save costs all round. Within one month after the pleadings in the action are deemed to be closed, the plaintiff must take out a summons for directions. A summons for directions is basically to prepare the action for trial. If the plaintiff does not take out a summons for directions in accordance with the provisions of O. 25 of the RHC, the defendant may apply for an order to dismiss the action. On an application by a defendant to dismiss the action under r. 1(4) of O. 25 of the RHC, the court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

Speed was uppermost in the minds of the plaintiffs' solicitors. After the Federal Court upheld the decision of the Court of Appeal on 25 August 1997 without striking out the present suit between the parties, the plaintiffs acted swiftly and expeditiously to prosecute the action. The House of Lords in *Birkett v. James* [1977] 3 WLR 38, [1977] 2 All ER 801 categorically laid down the principle that the court has the power to dismiss an action for want of prosecution in the following situations: where the plaintiff's default has not

only been intentional and contumelious but also where there has been an inordinate and inexcusable delay on the part of the plaintiff or on the part of the plaintiff's lawyer thereby giving rise to a substantial risk that the fair trial would not be possible or that the delay would seriously prejudice the defendant. In short, the plaintiff must prosecute his case expeditiously. A caveat must be placed, and that would be this: it is a futile exercise to dismiss an action for want of prosecution where any relevant period of limitation has not expired because in such a situation the plaintiff would be able to file another action for the same subject matter (*Instrumatic Ltd v. Supabrase Ltd* [1969] 1 WLR 519, [1969] 2 All ER 131, CA; and *Austin Securities Ltd v. Northgate and English Stores Ltd* [1969] 1 WLR 529, [1969] 2 All ER 753, CA).

In regard to the grant of the leave to amend under O. 20 r. 5 of the RHC, the general guiding principle would be to allow the amendment "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" (per Jenkins LJ in *GL Baker, Ltd v. Medway Building & Supplies, Ltd* [1958] 1 WLR 1216 at p. 1231). Bramwell LJ in *Tildesley v. Harper* 10 Ch D at pp. 396, 397 said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In exhibit marked as "GM2" of encl. 76, the intended amendments were specifically set out and this was a wise and desirable move adopted by the plaintiffs (*Lawrance v. Norreys* 39 Ch D p. 217; and *Derrick v. Williams* 55 TLR 676). The intended amendments in exhibit marked as "GM2" of encl. 76 were, in my view, properly and exactly formulated (*Derrick v. Williams* 55 TLR 676; *Hyams v. Stuart King* [1908] 2 KB p. 724; and *J Leavey & Co v. Hirst* [1944] KB 27).

Steps Taken By The Defendants

On 18 November 1997, the defendants filed a summons in chambers to strike out the plaintiffs' present civil suit as seen in encl. 62. The SAR allowed encl. 62 in favour of the defendants and this was on 22 October 1998. The aggrieved plaintiffs then filed an appeal to the judge in chambers against the decision of the SAR as seen in encl. 74.

As I said in the early part of this judgment, that encl. 62 was an application by the defendants to strike out the plaintiffs' present civil suit under O. 18 r. 19(1)(d) of the RHC and under the inherent jurisdiction of the court under O. 92 rule 4 of the RHC. The court certainly has the inherent jurisdiction to

strike out pleadings which are an abuse of the process of the court (*Reichel v. Magrath* 14 App Cas 665; *Remmington v. Scoles* [1897] 2 Ch 1, CA; and *Stephenson v. Garnett* [1898] 1 QB 677). Order 18 r. 19(1) of the RHC states that "the court may at any stage of the proceedings", *inter alia*, strike out any pleadings, yet in practice the application to strike out should always be made promptly, and as a rule before the close of pleadings (*Jamir Hassan v. Kang Min* [1992] 2 MLJ 46). But like all general rules there are exceptions to it. Thus, the court would always be magnanimous and has a discretion to allow the application even after the close of pleadings, but the court would probably refuse to exercise such a discretion where the matter has already been set down for trial (*Jamir Hassan v. Kang Min (supra)*; *Malayan Banking Bhd v. Gan Kong Yam* [1972] 1 MLJ 32; *Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83; and *Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd* [1995] 4 MLJ 691). The case of *AG of Duchy of Lancaster v. L & N W Ry*, [1892] 3 Ch 274 lays down the principle that where the statement of claim is being attacked, the application to strike out may be made before the defence is served. The application too should specify precisely what order is being sought – whether it is to strike out or to stay or dismiss the action or to enter judgment (*Williamson v. London, etc* [1879] 12 Ch D 787, 790). Then there is the principle which states that the party seeking to strike out part of a pleading must indicate precisely what he wants to be struck out (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd* (No. 3) [1970] Ch 506).

Indeed the power to dismiss summarily is a drastic power (*Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 and *Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156) and the court will always be wary and will only strike out a claim in plain and obvious cases and where the claim is so very obvious that it will be totally unsustainable on the face of it (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, SC; *Arah Cipta Sdn Bhd & Ors v. Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ 11, CA; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565, FC, and *Tan Keat Seng, Kitson v. Kerajaan Malaysia* [1996] 1 MLJ 454). At the end of the day, the court certainly has the inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin bin Raja Haji Takchik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, SC).

I will revert to and refer to encl. 74, in the course of my judgment, when the need arises.

Hipgrave v. Case (supra)

In the second judgment, the Court of Appeal referred to this case and an examination of this case would now be undertaken.

That was a case where the statement of claim set out the terms of the contract between the plaintiff and the defendant where the plaintiff agreed to sell and the defendant agreed to purchase all the plaintiff's right, title and interest in a cigar business and the lease of the premises on which the business was carried on, together with all the licences connected therewith, and the fixtures, goodwill, fittings, trade-utensils, furniture and effects and the stock in trades belonging to the business. Under the contract, the plaintiff also agreed to give up possession of the premises to the defendant on or before 1 May 1883, and by that time the defendant agreed to take and enter the premises and pay the purchase-money. It was further agreed under the contract that, if either of the parties should neglect to perform the agreement, the defaulting party should pay to the other the sum of 100 pounds as liquidated damages. The averment in the statement of claim alleged, *inter alia*, that:

> The plaintiff is and always has been able and willing to perform the said contract; the defendant, however, refuses to perform the said contract.

The plaintiff also claimed that the defendant might be specifically ordered (in the nature of a specific performance) to perform the said agreement or, in the alternative, that the plaintiff might be declared entitled to payment of the sum of 100 pounds as liquidated damages. On the other hand, the statement of defence, *inter alia*, alleged that the contract have been procured by certain false representations made by the plaintiff to the defendant before the making of the contract with reference to the character of the business and the length of the lease, and the defendant averred that:

> ... the defendant denies that the plaintiff is or ever has been able or willing to perform the said contract.

The plaintiff replied and joined the issue.

The trial proceeded before Vice-Chancellor Bacon and it was proved, in the course of the plaintiff's case, that after the close of the pleadings the plaintiff gave notice to the defendant in the following terms:

> 127, Strand. Referring to the contract between us respecting the above premises, I am and always have been able and willing to complete the same, and I now give you notice unless you complete the purchase within a week from this date I shall proceed to sell the property, and hold you liable to pay the sum of 100 pounds damages mentioned in the contract.

The defendant did not complete the contract, and the plaintiff accordingly proceeded to resell the business. The plaintiff's counsel contended that, though the plaintiff could not claim specific performance, he was entitled to the 100 pounds liquidated damages because the defendant refused to perform the agreement. The plaintiff's counsel did not make any application to amend the

pleadings. Vice-Chancellor Bacon, at the close of the plaintiff's case, held that the alternative right to damages did not arise until there had been a default in specific performance, and the plaintiff, having himself rendered specific performance impossible, was not entitled to succeed, and the action must be dismissed. Aggrieved by this decision, the plaintiff appealed. The Court of Appeal (Earl of Selborne LC, Brett MR, and Cotton LJ) affirmed the decision of Bacon, Vice-Chancellor and held that in the absence of any amendment of the pleadings (which ought not at that stage of the action to be allowed), the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before the Judicature Act in the Court of Chancery, and that the plaintiff, having by his own act rendered specific performance impossible, was not in such action entitled to damages.

Hemming QC and Jason Smith, for the plaintiff argued for the plaintiff in the following manner. It was submitted that the plaintiff had at the time of the action brought a right to two remedies in the alternative, namely, to the equitable remedy of specific performance, or, in the alternative, to damages as at common law. There was nothing since the Judicature Act to prevent the plaintiff combining in one action a claim for the two remedies alternatively and it was argued that the plaintiff could not have taken any other course. No doubt the plaintiff had, at the time of the hearing re-sold the business and by doing that the plaintiff was disentitled to ask for specific performance, but it was argued that the plaintiff had a right to damages, and if the plaintiff's action had been brought for damages only he must have recovered. It was argued that the fact that the plaintiff had originally included in his action the alternative claim for specific performance cannot affect his right to obtain damages. It was also argued that the plaintiff need not amend his claim and such amendment was not necessary. But alas, these arguments did not go on well with the Court of Appeal judges.

Earl of Selborne LC delivering a separate judgment had this to say at p. 360 of the report:

> If the Court should think that the Plaintiff cannot recover on the pleadings as they stand, it is submitted that, all the facts being before the Court, and having been known to the defendant, to whom no hardship could arise, the court should amend the pleadings on this appeal, and give judgment for the plaintiff for the liquidated damages. There was no occasion to ask for amendment, because the objection to the pleadings was not suggested till the judgment of nonsuit, after which it was not open to the plaintiff to ask for it.

His Lordship Earl of Selborne LC continued further at p. 360 of the report and spilling over to pp. 361 and 362 thereof:

I cannot but think that the decision of the Vice-Chancellor was right. If an amendment upon the record would have altered the case, it was for the Plaintiff to make such amendment, or ask for leave to make it, at the proper time and in the proper manner. The proper time would, *prima facie*, have been when the Plaintiff did that act which made specific performance of the contract impossible. Having omitted to amend then, at any rate he should have applied for an amendment at the hearing. The Court then might have granted such amendment upon such terms as it might have thought reasonable. I do not propose to offer any opinion as to what would have been the result of such an amendment. The plaintiff has his option with regard to the form of action he will bring and the remedy he will claim. The Plaintiff here elected to sue for specific performance, offering in the usual way on his part specifically to perform the agreement, and alleging his readiness and willingness to do so, which allegation, though it is in the present tense, must be taken, in my opinion, as importing a continuous readiness and willingness up to the time of the hearing. The Plaintiff thus declaring his election to claim specific performance, and offering on his part specifically to perform the agreement, I construe the prayer at the end of his claim to be a prayer for specific performance, with an alternative prayer for damages as a substitute for specific performance, in case the Court for any reason should not see its way to granting specific performance. I do not think that with regard to the construction of such a claim the Judicature Act has made any difference. Therefore I do not think it necessary to discuss what the powers of the Court might be with regard to damages in this case under the Judicature Act. Assuming that on a properly drawn claim for them the Court could give the damages which it is now asked to give, I think that the damages were here claimed merely as an alternative for the specific performance claimed upon an allegation of readiness and willingness to give the Defendant the property on paying the price.

The defendant, in his statement of defence, alleges, besides other matters which it is unnecessary to go into, that the plaintiff was not able and willing to perform the contract. Such being the state of the record, the plaintiff puts it out of his power to perform the contract by selling the property, and so disables himself from doing that which by his pleadings he offers to do. He does not, however, then alter his pleadings or make a new case. It is therefore by his own action entirely that he is placed in his present position. I cannot regard this as a merely technical matter. It appears to me to be a matter of substance. The defendant comes to the trial to meet the case set up by the plaintiff upon the record, *viz.*, a case entitling the plaintiff to specific performance or to damages in substitution for performance. I think we are regarding the substance of the case in holding the Plaintiff bound by the form of the claim which he has deliberately elected to make, and in not transforming his claim into a different claim, and the pleadings into different pleadings, at this stage of the proceedings. For these reasons I do not think we ought to give the relief that is now asked for. I also think that it is not for us to express any opinion whether any other form of action will now lie, and that we certainly ought

> not to reserve the Plaintiff liberty to bring an action for damages, a course which I am sure the Court of Chancery would not have taken in such a case as this before Lord Cairns' Act.

In a short concurring judgment, Brett MR had this to say at p. 362 of the report:

> I agree. I think that, the plaintiff having by the form of his pleadings and by his conduct of the case elected to put his claim as one for specific performance, with an alternative claim for damages merely as a substitute for specific performance in case for any reason the Court should feel itself unable to give effect to his prayer for specific performance, the Plaintiff cannot now be allowed to change the whole nature of his action by turning it into an ordinary action for damages as at Common Law.

Cotton LJ too agreed with the Earl of Selborne LC, and this was what his Lordship said (see p. 362 of the report):

> I agree, though I confess I feel some doubt on the question of amendment. I take it that the Plaintiff's claim involves an offer of specific performance on his part, and that he thereby alleges that he is still willing to perform the contract. The essence of his action is the claim for specific performance, and I think the claim for damages must be regarded as merely an alternative claim to meet the possibility of any difficulty arising in Equity with regard to his right to a decree for specific performance. The action being, therefore, essentially an action for specific performance, and continuing to be so up to the hearing, I do not think that any relief can be granted in such an action, when it appears that the Plaintiff has himself prevented specific performance by selling the property. I feel some doubt on the question whether an amendment ought to be allowed, but on the whole I think that, as it was not asked for at the hearing, we ought not to grant leave to amend at the present stage of the proceedings.

With the greatest of respect, I must say that the case of *Hipgrave v. Case (supra)* was not an action for damages at common law but rather, from the point of view of the pleading, it was purely a claim for specific performance with an alternate claim for damages in the event the plaintiff was disentitled from proceeding with specific performance. It would therefore be ideal to be cautious when applying *Hipgrave v. Case (supra)* in the Malaysian context because we have O. 81 of the RHC to be reckoned with. That order, having a statutory force, added a different complexion to the whole case and that order must be reproduced hereinunder:

> 81. Application by plaintiff for summary judgment (O. 81 r. 1)
>
> (1) In any action begun by writ indorsed with a claim –

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has entered an appearance in the action.

Order 81 of the RHC is akin to that of O. 14 of the RHC and it enables the plaintiff to obtain summary judgment without a trial. To be specific where there is no triable defence to the action, the plaintiff may obtain judgment in an action for specific performance of a contract, irrespective of whether it is in writing or otherwise, for the sale and purchase of land without having to proceed to a full trial. The procedure under O. 81 of the RHC is also applicable when a party desires to rescind an agreement or to forfeit or to return a deposit given under such an agreement. As alluded to earlier, encl. 11 was an application for specific performance of the agreement between the parties under O. 81 of the RHC and it was also for damages for breach of contract pursuant to O. 37 of the RHC. There was thus specific reference to O. 81 of the RHC in encl. 11 and the court must give effect to it. Of course, specific performance being a discretionary remedy the court must take into account equitable principles as set out in the Specific Relief Act 1950 before granting the order of specific performance (*Sekemas Sdn Bhd v. Lian Seng & Co Sdn Bhd* [1989] 2 MLJ 155).

In so far as the alternative claim for damages was concerned, I have this to say. It is correct to say and I so say that where a defaulter is willing to pay the sum as stated in the contract by way of a compensatory sum in case of default, it would not constitute a bar to that party from obtaining relief for specific performance of an agreement for the sale and purchase of property even if that party has prayed for damages as an alternative remedy: see *Zaibun SA Syed Ahmad v. Loh Koon Moy & Anor* [1982] 2 MLJ 92 where at p. 94, Lord Russell of Killowen aptly remarked:

> The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion.

Under O. 37 r. 4 of the RHC where a claim for damages is included, an inquiry into the assessment of unliquidated damages may be necessary. Under s. 19 of the Specific Relief Act 1950 liquidation of damages will not constitute a bar to specific performance.

Now, the plaintiff in *Hipgrave v. Case (supra)*, in the course of the trial, did not apply to amend the pleadings and even if the plaintiff did the court may not be inclined to allow at that stage. Here the plaintiffs took the necessary steps to file encl. 77 for leave to amend the writ and the statement of claim under O. 20 r. 5 of the RHC on 25 November 1998 well after the decisions of the Court of Appeal and the Federal Court.

Section 18(1) Of The Specific Relief Act 1950

This is a relevant section. It reads as follows:

> 18(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

It seems to me that s. 18(1) of the Specific Relief Act 1950 is modelled after the Lord Cairns' Act, in particular s. 2 thereof which reads as follows:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such a manner as the court shall direct.

Stamp J in *Sefton v. Tophams Ltd* [1965] Ch 1140 at 1169 remarked that s. 2 of the Lord Cairns' Act was not revolutionary at all. And according to Lord Halsbury in *Shelfer v. City of London Electric Lighting Co* [1895] 1 Ch 287 at 311, it was solely intended to extend the scope of the remedies which a court of equity could award and it was not intended to transfer the jurisdiction of a court of law to a court of equity. Lord Esher in *Chapman, Morsons & Co v. Auckland Union Guardians* [1889] 23 QBD 294 at 299 remarked that after the coming into force of the Supreme Court of Judicature Act 1873, there was a mistaken belief that s. 2 of the Lord Cairns' Act was otiose. The Supreme Court of Judicature Act 1873 gave the Chancery Division of the High Court power to award damages and this probably led to the repeal of s. 2 of the Lord Cairns' Act (see the *Statute Law Revision and Civil Procedure Act 1883*; see also Jolowicz *"Damages in Equity: A Study of Lord Cairns' Act"* [1975] CLJ 224 at 228-229). Soon it was realised that the power

to award equitable damages was a necessary remedy to protect purely equitable rights and I believe and it was assumed by the courts that the power to award equitable damages survived the repeal. This assumption bears testimony in the remarks of Viscount Finlay when his Lordship in *Leeds Industrial Co-operative Society v. Slack* [1924] AC 851 remarked at p. 863 that:

> ... though the Act is gone, the law which it laid down still exists.

Section 50 of the English Supreme Court Act 1981 gave a new lease of life when it gave the English Court of Appeal or the English High Court a statutory power to award damages "in addition to, or in substitution for, an injunction or specific performance."

It would not be wrong to say that equitable damages cannot be granted if there was no valid contract. Three authorities can easily be cited for this simple proposition of law, namely:

(1) *Lewers v. Earl of Shaftesbury* [1866] LR 2 Eq 270;

(2) *Waring and Gillow Ltd v. Thompson* [1912] 29 TLR 154 at 155; and

(3) *Stimson v. Gray* [1929] 1 Ch 629.

An array of authorities suggest strongly that the courts have no jurisdiction nor power to award equitable damages in the following situations:

(1) where the continued supervision of the contract was necessary in order to ensure the fulfilment of the contract (*Ryan v. Mutual Tontine Westminster Chambers' Association* [1893] 1 Ch 116 at 125; *JC Williamson Ltd v. Lukey and Mulholland* [1931] 45 CLR 282 at 297-298; and *Price v. Strange* [1978] Ch 337 at 369, the decision of Buckley LJ);

(2) where it involved a contract of the kind as described in the following words: "contract is for the sale or purchase of any commodity readily available on the market at an ascertainable price" (per Buckley LJ in *Price v. Strange (supra)*);

(3) where the contract was in the nature of a loan or one of agency (*Rogers v. Challis* [1859] 27 Beav 175; and *Chinnock v. Sainsbury* [1860] 30 LJ Ch 409);

(4) where the contract was in the nature of a partnership agreement (*Scott v. Rayment* [1868] LR7 Eq 112);

(5) where the contract was illegal as exemplified in *Norton v. Angus* [1926] 38 CLR 523 at 534;

(6) where the option contract was void for perpetuity (*Worthing Corpn v. Heather* [1906] 2 Ch 532; and *Stimson v. Gray* (1929) 1 Ch 629); and

(7) where the plaintiff was guilty of laches (*Lavery v. Pursell* [1888] 39 Ch D 508).

Now, the crucial question to ask would be this. At what point of time, must the court entertain an application for damages? According to the case of *Johnson v. Agnew* [1980] AC 367, the court would entertain such an application when the court has the jurisdiction at the time of the issue of the writ even if specific performance has become impossible of performance between the date of the writ and the hearing proper.

Reverting back to the case of *Hipgrave v. Case (supra)*, the Court of Appeal held that the plaintiff, having, after the defendant's repudiation, re-sold to a third party the business which the plaintiff had contracted to sell to the defendant, had consequently rendered specific performance impossible. The Court of Appeal also held that the plaintiff was not entitled to equitable damages in substitution for specific performance. The Court of Appeal also denied the plaintiff leave to claim damages at common law. This was in fact the judgment of *Hipgrave v. Case (supra)*, a decision which was relied upon by the second judgment. In my considered view the decision of *Hipgrave v. Case (supra)* was a harsh decision bearing in mind that it was the defendant in that case who had repudiated the contract. It would certainly be difficult to reconcile *Hipgrave v. Case (supra)* with that of *Johnson v. Agnew (supra)*. Be that as it may, prior to 1858, the English Court of Chancery was generally reluctant to award damages. This seemed to be the trend then and this can be seen in *"A Treatise on Specific Performance of Contracts"* by Williamson Donaldson Rawlins, 5th edn and the relevant passages in that book will now be reproduced. At p. 601, it was stated as follows:

> In the year 1858 an express power of awarding damages in cases of specific performance was conferred upon the Court of Chancery by the Chancery Amendment Act of that year (commonly called Lord Cairns' Act), whereby it was enacted (section 2) that, in all cases in which the Court of Chancery then had jurisdiction to entertain an application for an injunction against the breach of any covenant, contract, or agreement, as against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it should be lawful for the same Court, if it should think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance; and that such damages might be assessed in such manner as the Court should direct.

This would be followed by the passages of the same book especially at p. 603 to p. 605 thereof:

Now, however, the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act, and also all the powers of granting damages which before the passing of the Judicature Acts were exercisable by the Common Law Courts, are by virtue of the Judicature Act, 1873 (ss. 16, 76), vested in the High Court of Justice; and by the last mentioned Act it is expressly enacted (s. 24(7)) that the High Court and the Court of Appeal, in the exercise of their respective jurisdictions, in every cause or matter pending before them respectively shall grant, either absolutely or on such reasonable terms as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

1306.The Court therefore can now give damages in any of the following cases, *viz*.:

(i) In substitution for specific performance where there is a case for specific performance, – under Lord Cairns' Act.

(ii) Where there is no case for specific performance, under the Judicature Acts.

(iii) In addition to specific performance in whole or in part, – under Lord Cairns' Act, and probably also under the Judicature Acts.

Accordingly, a plaintiff may now come to the Court and say, Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.

But in order to the exercise of the peculiar jurisdiction under Lord Cairns' Act, the observance of the condition imposed by that statute is, notwithstanding the Judicature Acts, still obligatory upon the Court: and damages in addition to or in substitution for specific performance will be given by virtue of that jurisdiction only when the plaintiff had a case for specific performance at the time when he issued his writ. Furthermore, the plaintiff cannot succeed on a claim for damages in substitution for specific performance when he has even after the action began disentitled himself to specific performance, as where a vendor after action sold the subject matter of the contract to a third person.

In Malaysia, the position would be governed by s. 18 of the Specific Relief Act 1950 and O. 81 of the RHC. In practice, a plaintiff who seeks an order for specific performance will also ask for damages in addition to, or in substitution for specific performance. For instance, a plaintiff will claim for specific performance of the agreement and "further or alternatively" will claim

for damages for breach of contract or in the words of *Horsler v. Zorro* [1975] Ch 302, the plaintiff will seek "damages *in lieu* of or in addition to specific performance". As demonstrated in the early part of this judgment, the plaintiffs averred in para. (ii) of their statement of claim the following prayer:

> Further damages in the alternative damages for breach of contract;

and for fear of repetition O. 81 of the RHC envisages the situation where in any action begun by writ with a claim for specific performance with or without an alternative claim for damages, the plaintiff may on the grounds that the defendant has no defence to the action, apply to the court for judgment.

This brings me to the case of *Woodlands v. Hind* [1955] 2 All ER 604 which was a case involving a claim for specific performance or damages *in lieu*. The brief facts of that case may be stated as follows. By an agreement which was originally oral but later it was either reduced into writing or evidenced by a letter dated 14 January 1952, the defendant agreed that in consideration of the plaintiffs taking preference and other shares in H., Ltd., a private company of which the defendant was a director, he, the defendant, would purchase at par or find a purchaser at par for such of the preference shares as the plaintiff might hold on 25 December 1954. The plaintiff took up the shares, but apart from a small payment which he made to the plaintiff and which was treated as an interim payment under the agreement, the defendant failed to carry out his part of the agreement. The plaintiff then issued a writ dated 27 January 1955, indorsed with claims for specific performance of the agreement, or, alternatively, damages *in lieu* of specific performance. The plaintiff elected to treat the agreement as repudiated and issued a summons for summary judgment under RSC, O. 14A, for an inquiry as to damages. The court held that an agreement either to purchase shares or to find a purchaser for them was an agreement for the sale or purchase of property within r. 1(1) of O. 14A, and, as that order extended to alternative claims within the scope of the words "alternative claims for damages, for rescission or for the forfeiture or return of the deposit" in r. 1(1), the inquiry as to damages would be ordered. Vaisey J delivering the judgment of the court at the Chancery Division had this to say at p. 605 of the report:

> This summons raises a somewhat curious point on the proper construction, first, of an agreement which was originally oral but has either been reduced into writing or evidenced by a letter dated Jan. 14, 1952, and also on the true construction of the new order, R.S.C., O. 14A (see S.I. 1954 No. 1728), which came into operation on Jan. 11, 1955.
>
> The chief difference between the new Ord. 14A and the old one is that the old O. 14A only applied to agreements in writing whereas the new O. 14A applies to agreements whether in writing or not. There are also other differences

between the two orders, some of which are material for the purposes of the present case. The first is this: The old O. 14A is headed with the words "Summary judgment for specific performance", but the new O. 14A is headed with the words "Summary judgment in actions for specific performance". Arising from that difference, it is to be observed that the kind of action to which O. 14A in its old form and its new form applies is a claim for specific performance of an agreement for the sale or purchase of property, but the new order has these additional words:

> … with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit …

The difference reflected or anticipated in the heading of the new order is the difference between a case of summary judgment for specific performance and a case of summary judgment in an action for specific performance, where the action, as r. 1(1) indicates, may be an action for specific performance of an agreement for sale with or without a number of alternative claims.

Under the new r. 1(1), following very closely the words of the old rule, it is provided: "…. the court or judge may thereupon give judgment in the action unless the defendant by affidavit …." satisfies the court that he is entitled to defend. The new O. 14A covers a case in which the alternative claims or some or one of them are associated as an alternative to the main claim for specific performance. That is what is happening here. The plaintiff has elected to treat the agreement in question as repudiated and is asserting a claim for damages which is one of the claims set out in the indorsement to the writ.

Now, in the present appeal by way of encl. 74, the scenario would be different. As demonstrated, the plaintiffs claimed in the alternative damages for breach of contract. As demonstrated, O. 81 of the RHC clearly envisages the situation where the claim for specific performance can be combined with or without an alternative claim for damages. In England, a similar provision in the form of the new order, that of RSC O. 14A which came into operation on 11 January 1955 was worded in these words:

> ... with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit …

and it was clearly the law in England after *Hipgrave v. Case (supra)*. But alas, it was nowhere adverted to in the second judgment. With the greatest of respect, after 11 January 1955, the case of *Hipgrave v. Case (supra)* would be heavily watered down by the new O. 14A of the English RSC, which came into effect according to the judgment of Vaisey J in *Woodlands v. Hind (supra)* on 11 January 1955. It would be germane to mention that in the case of *Hipgrave v. Case (supra)*, the plaintiff's pleading was inadequate as it did not include a claim in the alternative for damages for breach of contract and it

was not surprising that their Lordships held the view that the plaintiff in that case cannot at that stage convert the action for damages at common law.

Enclosure 74

As I said earlier, the present civil suit between the parties still persist and in existence. The plaintiffs are prosecuting that civil suit by filing encls. 59 and 77 and they have every right to pursue the matter right to the very end. In my judgment, for the varied reasons advanced in the preceding paragraphs it was certainly not an abuse of the process of the court for the plaintiffs to proceed with the claim. The present civil suit should proceed for trial so that the court would be able to determine two interesting issues :

(1) whether the payment of RM136,000 paid by the defendants to the plaintiffs amounted to full and final settlement?

(2) and if the answer would be in the negative, then the next question would be whether the plaintiffs' claim for damages was limited to RM136,000 on the assumption that the plaintiffs had established that the contract had been breached by the defendants?

The appeal in encl. 74 should be decided in favour of the plaintiffs. In short, encl. 74 should be allowed with costs. It must be put on record that the submissions of Mr. Gana Muthusamy, learned counsel for the plaintiffs, were of tremendous help and it certainly assisted me to a great extent in adjudicating encl. 74. Indeed the submissions of Mr. Gana Muthusamy opened new horizons for everyone to see and appreciate.

Lest I be accused of an oversight, I will now consider the arguments of the defendants through their learned counsel, Mr. C. Kumareson, not in its order of priority.

If The Present Civil Suit Was Allowed To Proceed, It Would Be Inconsistent With That Part Of The Consent Order Dated 28 March 1995

It must be recalled that the prayer for specific performance was abandoned by consent on 28 March 1995, but the then counsel for the plaintiffs wanted damages to be assessed and I had acceded to that request and ordered that damages to be assessed as reflected in the first judgment. Later, the Court of Appeal in its second judgment set aside this order and the Federal Court too concurred and affirmed this part of the decision of the Court of Appeal. But both the superior courts – the Court of Appeal and the Federal Court did not set aside the present civil suit. Moreover, the plaintiffs in the present civil suit had also pleaded an alternative claim for damages for breach of contract.

Our Courts Do Not Have The Power To Order Damages Once Specific Performance Has Been Abandoned Because The English Judicature Act 1873 Is Inapplicable To Malaysia

Section 74(1) of the Contracts Act 1950 gives the power to the court to order damages for breach of contract and it enacts as follows:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Then there is s. 18(2) of the Specific Relief Act 1950 which enacts that the court upon an application by any person for specific performance may, if it decides that specific performance ought not to be granted, grant compensation. It is salutary to refer to the case of *Ardeshir H. Mama v. Flora Sassoon* AIR [1928] 208, a decision of the Privy Council. The principles that can be distilled from that case can, *inter alia*, be stated as follows (see p. 209 of the report):

> A suit for specific performance or damages in the alternative can be amended so as to convert it into one for damages only. That the court should have the power of granting such an amendment in a proper case is salutary and indeed necessary. But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position of both the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff out of his right, the plaintiff must not by its ill-considered exercise be permitted to turn his suit into a gamble for himself at the defendant's expense. It would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually remodelled in a form appropriate in action seeking compensation for breach of contract and nothing else.

It would be germane to remember that the suit in *Ardeshir H. Mama v. Flora Sassoon (supra)* commenced in the High Court of Judicature at Bombay and was at its inception a simple action by a purchaser for the specific performance of a contract for the sale of certain valuable hereditaments on Malabar Hill in Bombay with claims for damages additional or alternative and all in terms of s. 19 of the Specific Relief Act 1877. The defences to the suit were that there never had been any concluded contract for the sale of the property and if there had been such a contract it had been entered into on behalf of the defendant by an agent with no authority to bind her to its terms. Some nine months before the trial, the plaintiff's solicitors formally notified the defendant to the effect that the plaintiff had decided to abandon his claim for specific performance and that he would instead at the trial claim damages against the

defendant for her breach of contract. Lord Blanesburgh speaking for the Privy Council had this to say at p. 216 of the report:

> All this is, historically, the explanation of the fact, that in relation to a contract to which the equitable form of relief was applicable, a party thereto had two remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. He might either institute a suit in equity for specific performance, or he might bring an action at law for the breach. But – and this the basic fact to be remembered throughout the present discussion – his attitude towards the contract and towards the defendant differed fundamentally according to his choice.
>
> Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered.
>
> In a suit for specific performance on the other hand, he treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as *Clough v. L & NWR* [1872] 7 Ex 26=41 LJ Ex 17=25 LT 708=20 WR 189 and *Law v. Law* [1905] 1 Ch 140=74 LJ Ch 169=53 WR 227=92 LT 1=21 TLR102, a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had by his election precluded himself even from making the averment just referred to, proof of which was essential to the success of his suit.

But the remarks of his Lordship must be viewed in the context of our s. 74(1) of the Contracts Act 1950 and our s. 18(2) of the Specific Relief Act 1950.

Another interesting case would be that of *Gopi Nath Sen and Others v. Bahadurmul Dulichand and Others* AIR [1979] 203. The question which the court had to face just like the question which the court in *Ardeshir H. Mama v. Flora Sassoon* (*supra*) had to face was this: Could the plaintiff have waived or abandoned the claim for specific performance and claimed damages simpliciter *in lieu* thereof? This question was answered in the negative in both these two cases. But Ramendra Mohan Datta J in *Gopi Nath Sen and Others v. Bahadurmul Dulichand and others* (*supra)* approached the issue in a

practical way. His Lordship was faced with a case that proceeded for trial and in the course of the trial, the plaintiff was asked whether he was ready and willing to take the lease. The plaintiff's answer was:

> No. At present we claim damages only.

In clear and lucid words, his Lordship Ramendra Mohan Datta J said (see pp. 204 to 205 of the report):

> It is to be remembered that the question of granting relief by way of damages *in lieu* of or in substitution of specific performance is a matter resting entirely with the Court and parties have nothing to do with it. The plaintiff cannot be allowed to abandon the case for specific performance and yet claim damages *in lieu* thereof as they have purported to do here. If the plaintiff has to choose his course of action then that must be done at the initial stage. He must decide once for all whether he was to pursue his remedy by claiming specific performance in which case he must satisfy the Court till the hearing is concluded and the judgment is delivered that he wanted specific performance. In such circumstances only it is a matter for the Court to consider in a proper case whether or not damages *in lieu* of specific performance was to be allowed.
>
> If the plaintiff would so choose to abandon his claim for specific performance and to pursue his claim for damages simpliciter then that must be done before the trial begins. If he asks for amendment of the plaint by abandoning the case of specific performance he cannot be allowed to do so in the midst of the trial and to claim damages *in lieu* of specific performance.

In the present appeal, the trial had not proceeded and the plaintiffs filed encl. 77 to amend the writ and the statement of claim in order to comply with the decision of the Court of Appeal. Even Ramendra Mohan Datta J in *Gopi Nath Sen and Others v. Bahadurmul Dulichand (supra)* remarked at p. 205 of the report:

> Moreover, the question of damages simpliciter cannot be considered when the pleading as to readiness and willingness in the plaint still remains intact.

Now, s. 2 of Lord Cairns' Act 1859, the new O. 14A of the English RSC, and our s. 18(1) of the Specific Relief Act 1950 clearly allow an action for specific performance and damages for breach of contract.

It would be interesting to note that the English Judicature Act 1873 did not bring any change to the law, it only affected the procedure. Lord Blanesburgh in *Ardeshir H. Mama v. Flora Sassoon (supra)* at p. 217 of the report, explained it in this way:

> The change in this matter effected in England by the Judicature Act was one in procedure only. It enabled every Division of the High Court to give both legal and equitable remedies, but it did not alter the construction or effect of

a claim framed under Lord Cairns' Act – see *Hipgrave v. Case* [1885] 28 ChD 356=54 LJ Ch 399=52 LT 242 *ibid*, at p. 36, nor the principles upon which the systems now combined were before the Act, separately administered. Accordingly, an order dismissing an action for specific performance which before the Act would have been unqualified, remained after the Act a decree which excluded the possibility of legal relief.

This very principle has been retained in s. 29 of the Indian Specific Relief Act and our s. 28 of the Specific Relief Act 1950. For convenience, s. 28 of the Specific Relief Act 1950 enacts as follows:

The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of the contract or part, as the case may be.

To summarise, the legal positions would be in these terms:

(1) That Lord Cairns' Act 1859 conferred upon Equity Courts in England the power to award damages in substitution or in addition to specific performance. This gave the Equity Courts in England the inherent power to award damages.

(2) The English Judicature Act 1873 allowed any division of the High Court to give both legal and equitable remedies but it did not alter the construction and effect of a claim formulated under the Lord Cairns' Act 1859 (see *Ardeshir H. Mama v. Flora Sassoon (supra)*).

(3) Section 2 of the Lord Cairns' Act 1859 is clearly reflected in our s. 18 of the Specific Relief Act 1950 and in the Indian s. 21 of the Specific Relief Act.

(4) If a party claims for specific performance but abandons it at the trial, the court cannot award damages at common law without sufficient amendment (see the case of *Hipgrave v. Case (supra)*).

(5) If a claim for specific performance with damages *in lieu* of specific performance is abandoned at the trial, the question of damages for specific performance in substitution also fails. This does not prevent the plaintiff from amending his claim to one of damages for breach of contract before the trial proper. (See the cases of *Ardeshir H. Mama v. Flora Sassoon (supra)* and *Gopi Nath Sen and Others v. Bahadurmul Dulichand (supra)*).

(6) In the present appeal, O. 81 of the RHC clearly provides that reliefs to be framed in the alternative.

Since The Court Of Appeal And The Federal Court Dismissed The Appeals, The Matter Has Now Come To An End

But these two superior courts did not strike out the present civil suit. In *Diamond Peak Sdn Bhd & Anor v. Tweedie* [1980] 2 MLJ 31, the then Federal Court held that the High Court had no power in an application for summary judgment to dismiss the action. All that was open to the trial judge to do in regard to the appellant's application for summary judgment under O. 14A was to give the respondent unconditional leave to defend.

Conclusion

I repeat, encl. 74 should be allowed with costs. Both Mr. Gana Muthusamy and Mr. C. Kumareson argued the appeal in encl. 74 with vigour and vitality. They have done a thorough research which greatly assisted me in adjudicating encl. 74. Both these fine gentlemen and remarkable lawyers showed beyond doubt that "the law is not the same at morning and at night" (per George Herbert, Jacula Prudentum).